

sd CERS
San Diego City Employees'
Retirement System

December 9, 2004

Hon. Donna Frye
Chairman, Open Government Committee
City of San Diego
202 West C Street
San Diego, CA 92101

Dear Chairman Frye:

The undersigned is a member of the Board of Administration of the San Diego City Retirement System.

On November 19th, the Board in a closed session not noticed for the purpose, took actions to preclude me from all future closed sessions of the Board and requested intervention of the Mayor (without any legal authority) to "suspend" me from all future Board meetings pending a decision from the Ethics Commission on a complaint they planned to file in the future. I was not told of the intent of the board to entertain any of these matters at the November 19th meeting, and though I attended the open session, I was not at the closed session portion of the meeting. I was subsequently advised of the Board's action on November 22nd.

The history of this latest highly irregular event at the Pension Board is set out in the materials that accompany this letter and I would appreciate your review of same to put this matter in context.

I am happy to respond to any such stuff that comes from the Pension Board. However, there is something far more dangerous and sinister evidenced here that now falls within the ambit of your new Committee assignment.

Most of the mischief occurring on the Pension Board now regularly occurs in closed session.

In this case, my abrupt removal from future closed sessions comes, coincidentally, at a time when the Board is negotiating a settlement with our former fiduciary counsel, Mr. Blum, which might be fraudulent as against Mr. Blum's insurance carrier if the comments of Cathy Lexin found in the Vinson & Elkins public report to the effect that the City bluffed (defrauded) the Board prove to be true. Following the public release of her comments, Joe Lopez replaced Ms. Lexin on the Board. I have repeatedly raised this matter for obvious ethical and legal reasons, and because there are secret "fee deals" with some counsels which cost the System millions of dollars that are never fully vetted to Board, much less the public. In this Blum matter, the counsel might be in line for payment of several million dollars for a complaint that was never served under a fee agreement that was never circulated to the board.

The Retirement Board has been successfully sued for Brown Act violations in the past, but it doesn't seem to slow them down.

I have requested the Public Integrity Division of the City Attorney's office, headed by Rupert Linley, Chief Deputy of the Criminal Division, to review the Brown Act violations.

I would also appreciate the involvement of your Committee, if appropriate, in insuring that this secret, illegal meeting behavior is remedied here and precluded in the future.

Beyond that, there is a need for far more transparency in general, including the disclosure of attorneys' fees and fee deals with the Retirement Board. Your Committee work on that subject would also be appreciated.

Please feel free to contact me regarding this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Diann Shipione".

Diann Shipione, Trustee

encl.

cc: sdCERS Board
Lawrence Grissom
Paul Barnett

11/23/2004 15:19 6192237746

RICHARD H BENES

PAGE 82/83

11/22/2004 11:02 FAX 8587581908

Law Off. Michael Conger - Rick Benes

8006/817

1 MICHAEL A. CONGER, ESQUIRE (State Bar #147882)
2 LAW OFFICES OF MICHAEL A. CONGER
3 16236 San Diegoito Road, Suite 4-14
4 Mailing: P.O. Box 9374
5 Rancho Santa Fe, California 92067
6 Telephone: (858) 759-0200
7 Facsimile: (858) 759-1906

8 Attorneys for Plaintiffs JAMES F. GLEASON and
9 DAVID W. WOOD, individually and on behalf of
10 all others similarly situated

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

JAMES F. GLEASON and DAVID W. WOOD,
individually and on behalf of all others similarly
situated,

Plaintiffs,

v.

SAN DIEGO CITY EMPLOYEES'
RETIREMENT SYSTEM, CITY OF SAN
DIEGO, FREDERICK PIERCE, IV, JOHN
TORRES, JOHN CASEY, DAVID CROW,
MARY VATTIMO, RON SAATHOFF,
TERRI WEBSTER, SHARON WILKINSON,
DICK VORTMANN, RAY GARNICA, and
DOES 1-100,

Defendants.

AND RELATED CONSOLIDATED ACTIONS

CASE NO: GIC 803779
(Consolidated with Case Nos.
GIC 810837 and GIC 811756)

Date: November 3, 2004
Time: 8:45 a.m.
Judge: The Honorable Patricia A. Y.
Covett
Dept: 67
Action Filed: January 16, 2003

DECLARATION OF JAMES F.
GLEASON IN SUPPORT OF
PLAINTIFFS' EX PARTE
APPLICATION TO COMPEL
PRODUCTION OF MULTI-
MILLION DOLLAR FEE
AGREEMENT

I, James F. Gleason, declare as follows:

1. I am a former City of San Diego employee and one of the plaintiffs in these consolidated actions. I worked for the City for 30 years, including as a police officer, and I retired in 1982 as Director of Environmental Quality. I have personal knowledge of the matters stated herein and if called to do so could testify competently thereto.

///

Declaration of James F. Gleason in Support of Plaintiffs' Ex Parte Application to Compel
Production of Multi-Million Dollar Fee Agreement

11/23/2004 16:19 6192237746

RICHARD H BENES

PAGE 03/03

11/02/2004 11:03 FAX 8587381806

Law Off. Michael Conger + Rick Benes

007/017

1 2. In a recent conversation with Diann Shippione, one of the trustees of SDCERS, I
2 requested that she disclose to me the terms of the attorney fee agreement SDCERS had entered
3 into with the lawyers representing SDCERS in an attorney malpractice case, *SDCERS v.*
4 *Hanson, Bridgett, et al.*, filed June 25, 2004, case No. GIC 831983.

5 3. Trustee Shippione told me that it was her understanding that these attorneys had
6 been hired on a percentage contingency fee basis of between 25% and 35%.

7 4. Trustee Shippione has also informed me that she has attempted to learn more of
8 the details of this fee agreement, but SDCERS will not so inform her.

9 Executed this 2nd day of November, 2004, at Rancho Santa Fe, California.

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12 James F. Gleason
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Diann

From: "Paul Barnett" <PBarnett@sandiego.gov>
To: <diann@san.rr.com>
Sent: Friday, October 29, 2004 3:48 PM
Subject: Re: 2nd request

I have been advised that the agreement between SDCERS and Behan & Smith is a privileged document of the Retirement Board and can only be distributed if the Board waives the privilege. Therefore, if you still need a copy of this agreement, I would ask that you seek the Board's approval when we have the closed session meeting to discuss the Hanson and Bridgett case. If you have any questions regarding the privileged nature of this document, please contact either Mike Leone or Reg Vitek at Seltzer, Caplan, et. al.

>>> "Diann Shipione Shea" <diann@san.rr.com> 10/29/04 02:22PM >>>

Paul,

Thanks for the information. Please fax me the agreement anyway.

Regards,

Diann

— Original Message —

From: Paul Barnett
To: diann@san.rr.com
Sent: Friday, October 29, 2004 10:20 AM
Subject: Re: 2nd request

Diann, when we spoke on Wednesday I don't recall that you asked me to fax you this document. You indicated that you had concerns about the System paying attorney's fees to Behan & Smith for a lawsuit which you believe may be inappropriate based on the timing of benefit increases and the implementation of Manager's Proposal II in 2002.

I can confirm that Behan & Smith are on a retainer, so no fees are paid to these attorneys for the time they are spending discussing a possible settlement of our lawsuit against Hanson, Bridgett. As you know, we are trying to schedule a special Board meeting to discuss a settlement of the Hanson, Bridgett lawsuit, and you will be able to raise your concerns about this lawsuit and ask any questions you may have directly to Neil Behan and Alton Smith at that time.

>>> "Diann Shipione Shea" <diann@san.rr.com> 10/28/04 05:45PM >>>

Paul,

Just following up. Per our phone conversation yesterday please fax me a copy of the Behan Smith fee agreement. My fax is: 858-459-6523. Thank you.

Regards,
 Diann

Diann

From: "Paul Barnett" <PBarnett@sandiego.gov>
To: <diann@san.rr.com>
Sent: Friday, October 29, 2004 9:20 AM
Subject: Re: 2nd request

Diann, when we spoke on Wednesday I don't recall that you asked me to fax you this document. You indicated that you had concerns about the System paying attorney's fees to Behan & Smith for a lawsuit which you believe may be inappropriate based on the timing of benefit increases and the implementation of Manager's Proposal II in 2002.

I can confirm that Behan & Smith are on a retainer, so no fees are paid to these attorneys for the time they are spending discussing a possible settlement of our lawsuit against Hanson, Bridgett. As you know, we are trying to schedule a special Board meeting to discuss a settlement of the Hanson, Bridgett lawsuit, and you will be able to raise your concerns about this lawsuit and ask any questions you may have directly to Neil Behan and Alton Smith at that time.

>>> "Diann Shipione Shea" <diann@san.rr.com> 10/28/04 05:45PM >>>
Paul,

Just following up. Per our phone conversation yesterday please fax me a copy of the Bahan Smith fee agreement. My fax is: 858-459-6523. Thank you.

Regards,
Diann

11/23/2004

Diann

From: "Diann Shipione Shea" <diann@san.rr.com>
To: "Paul Barnett" <PBarnett@sandiego.gov>
Sent: Friday, October 29, 2004 1:22 PM
Subject: Re: 2nd request

Paul,

Thanks for the information. Please fax me the agreement anyway.

Regards,

Diann

— Original Message —

From: Paul Barnett
To: diann@san.rr.com
Sent: Friday, October 29, 2004 10:20 AM
Subject: Re: 2nd request

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>>> "Diann Shipione Shea" <diann@san.rr.com> 10/28/04 05:45PM >>>

Paul,

Just following up. Per our phone conversation yesterday please fax me a copy of the Bahan Smith fee agreement. My fax is: 858-459-6523. Thank you.

Regards,

Diann

Diann

From: "Diann Shipione Shea" <diann@san.rr.com>
To: "Charles Hogquist" <Chogquist@pd.sandiego.gov>; "Fred Pierce" <fpierce@foundation.sdsu.edu>; "Ron Saathoff" <rsaathoff@aol.com>; "Ray Guarnica" <rg92129@Hotmail.com>; "Dick Vortmann" <dvortman@nassco.com>; "Sharon Wilkinson" <swilkinson@sandiego.gov>; "Terri Webster" <twebster@sandiego.gov>; "Mary Vattimo" <mvattimo@sandiego.gov>; "Cathy Lexin" <clexin@sandiego.gov>; "Dave Crow" <pbnuggets@aol.com>; "John Torres" <jttorres@msn.com>; "Steve Meyer" <smeyer@sandiego.gov>; "rod.crane@mercer.com"; <marcia.chapman@mercer.com>; "Maco, Paul S." <pmaco@velaw.com>; <rsauer@velaw.com>; "Andrew Paulden" <apaulden@barrcpa.com>; "Amanda Wilson" <awilson@bacpas.com>
Sent: Friday, November 19, 2004 7:02 PM
Attach: header.htm
Subject: Failure To Disclose Fee Agreements; Misuse of System Funds

sd CERS
San Diego City Employees'
Retirement System

TO: SDCERS Board
 Mercer
 Brown Armstrong
 Vinson & Elkins

FROM: Diann Shipione, SDCERS Trustee

DATE: November 19, 2004

RE: **Failure To Disclose Fee Agreements; Misuse of System Funds**

In its November 8, 2004 Staff Report, the Board was advised of the 'broadly construed' Constitutional requirement of disclosure of public writings.

The Vinson & Elkins report references the Board's fiduciary obligations including "defraying the reasonable expenses of the system".

I have repeatedly requested copies of our fee agreements with, and the amounts of bills paid to, outside counsels. My requests have been denied. The third party providers have been instructed not to speak with me or to answer my questions. Items I request be docketed for discussion on this topic have been ignored.

Fees to "preferred" outside counsels and consultants are hidden from public view (and even from the scrutiny of certain Trustees) under the artifice of "privilege". These are public monies. Nobody is asking for 'secret' or 'privileged' materials. Just, what are we paying these professionals under the agreements made with the System and paid for with the System's funds. Nothing is secret about that.

11/23/2004

The Board needs to know what our financial agreements are with outside counsels and professionals. We cannot protect our funds without this information. It leads to speculation and suspicion of 'insider deals' for special friends, and payments outside the normal course of such services.

Recently we were advised that a law firm had been recommended by staff to 'talk to' Blum's attorneys about settling the System's claims which were originally brought by Mr. Conger. I asked to see the fee agreement and was denied by staff. The fee arrangement has still not been disclosed to the Board, but the rumor is that it would be a contingency fee of an unknown amount. There has been no disclosure of how this firm was selected, or if 'referral' or 'finders' fees would be paid by the firm to others. No one will disclose the 'deal' to the Board.

This raises the highest degree of suspicion. It is not a 'privileged' matter to spend the System's money.

Until the Board starts insisting on disclosing the financial arrangements with its 'insider' counsels, it will be under ever increasing scrutiny.

Of course, all of these fees would have been avoided if the Board had not allowed intentional underfunding in the Billions of dollars in the first place. We have now hired at least the following legal firms to cover these actions:

- Seltzer Kaplan,
- Coughlan Semmer & Lipman,
- Nell Hennessey,
- Pillsbury Winthrop,
- Hanson Bridgett, and
- Bahan Smith

At a minimum the Trustees, and the public for that matter, deserve to know how much money we are spending with these counsels and the terms of their employment.



November 22, 2004

Diann Shipione Shea
7701 Exchange Place
La Jolla, CA 92037

Re: Notice of Board Action Regarding Information Under Seal in the Matter of
Gleason v. SDCERS et. al, GIC803779

Dear Ms. Shipione:

On November 19, the Retirement Board made several decisions that impact your future participation on the SDCERS Board. It was unfortunate that you had to leave the meeting unexpectedly, just before these issues were addressed. But, the conduct being addressed by the Board was so severe that action was necessary to protect SDCERS from further prejudice in pending litigation.

First, by an 11-0 vote, the Board has barred you from participation in all future closed sessions. Second, by a 10-1 vote the Board voted to file a formal complaint against you with the City's Ethics Commission. Third, by a 9-2 vote the Board voted to notify Mayor Dick Murphy of its decisions, the basis therefor, with a request to the Mayor to suspend you from your position on the Board pending the outcome of the Ethics complaint.

These decisions arise from your disclosure of attorney-client privileged information and confidential closed session discussions to James Gleason, the plaintiff in a multimillion dollar lawsuit pending against SDCERS and the City. On November 3, 2004, Mr. Gleason submitted a sworn declaration in the matter of *Gleason v. City of San Diego et al*, SDSC case number GIC803779, stating that you disclosed to him terms of SDCERS' privileged fee arrangement in another litigation, *SDCERS v. Hanson Bridgett, et. al*. SDSC case number GIC831983.

Two days prior, on November 1, plaintiff's attorney, Mike Conger demanded the very same information in a private telephone call to SDCERS' outside counsel, Michael A. Leone. Within a few minutes of Mr. Conger's call, you contacted Paul Barnett of this office and asked Mr. Barnett to refresh your memory as to the exact terms of SDCERS' contingent fee agreement. Mr. Barnett was aware of Mr. Conger's demands and did not provide the information. Mr. Conger, it appears, had already been provided the

information by Mr. Gleason, who apparently had obtained it from you. By his actions and with your assistance, it appears Mr. Conger hoped to obtain the information legally, so that he could use it as an argument in support of his \$10.7 million dollar claim for fees against SDCERS and the City in the *Gleason* litigation. Thus, it appears you have willfully used confidential information to help the plaintiffs obtain money from SDCERS.

Fortunately, Mr. Conger's *ex parte* application to compel SDCERS to provide its *Hanson Bridgett* fee agreement in the *Gleason* litigation failed. The trial court in the *Gleason* litigation concluded that the information you shared with Mr. Gleason was protected by the attorney-client privilege, and placed that information under seal to prevent further unauthorized disclosure of SDCERS' privileged communications with its counsel in the *Hanson Bridgett* litigation. ***This letter is formal notice to you that any future disclosure by you of the information under seal – the terms of the contingent fee agreement entered into between SDCERS, Cornelius Bahan, Esq. and Alton J. Smith, Esq. – will subject you to punishment for contempt of court.***

The Board's actions were taken to protect SDCERS from further prejudice in pending litigation. No one may disclose confidential information that has been obtained in closed session authorized by Govt. Code §54956.9 to a person not entitled to receive it. (Govt. Code § 54963.) Moreover, the contingent fee agreement discussed in closed session is, in itself, protected by the attorney-client privilege. (Evid. Code § 952; B & P Code 6149.) The attorney-client privilege is just as available to public agency clients and their lawyers as to their private counterparts. (*Holm v. Superior Court* (1954) 42 Cal.2d 500, 506-508).

As a fiduciary, you are obligated to conduct yourself with the "utmost integrity, professionalism and ethical behavior". (Board Rule 1.10.) You are specifically charged to "avoid any activity which may be interpreted as a conflict of interest"; to maintain the confidentiality of SDCERS information; to refrain from knowingly being party to any illegal activity related to SDCERS and to refrain from engaging in outside activities of "financial or personal interest" that may conflict with the impartial and objective execution of SDCERS' business. (Board Rule 1.10(g),(j); Board Rule 1.20(c), (g).)

Board Rule 1.30 authorizes the Board to censure or remove a Board member for violation of Rule 1.20. The legal definition of "censure" is "to reprimand harshly." In this case, the Board has decided to protect SDCERS' interests by barring you from future closed sessions. This action has been cited with approval by the State's Attorney General.

Your disclosure of confidential, attorney-client privileged information obtained in closed session is also a violation of SDMC § 27.3564, which provides that "it is unlawful for any City official to use or disclose any confidential information . . . acquired in the course of

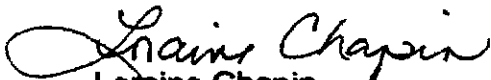
Diann Shipione Shea
November 22, 2004
Page 3

his or her official duties" Based on the facts currently in its possession, the Board voted to file an Ethics Commission complaint against you. (SDMC § 27.3581) The Ethics Commission retains the right to handle the matter administratively or to refer it for criminal action.

Finally, the Board voted to ask Mayor Dick Murphy to suspend you from office pending the Ethics Commission's decision. The Board's request is based on Charter sections 30 and 117; Govt. Code §§ 54956.9; 54963; SDMC § 27.3564(e); Evid. Code § 952; Board Rules 1.10, 1.20; and for threatening the Board's position in a multi-million dollar litigation.

Had you not left the Board meeting unexpectedly, you would have had an opportunity to respond to these serious charges. Many on the Board expressed dismay that you were unavailable. Therefore, if you would like to address the Board regarding its decisions, please contact me at your earliest convenience. In addition, feel free to call me if you have any questions.

Sincerely,


Loraine Chapin
General Counsel

CC: Lawrence B. Grissom, Retirement Administrator
Paul Barnett, Assistant Retirement Administrator
SDCERS Board Members



November 22, 2004

The Honorable Richard M. Murphy
Mayor, City of San Diego
City Hall - 202 C Street
San Diego, CA 92101

Hand Delivered

Re: Notice of Board Action Regarding Diann Shipione Shea and Request for Her Immediate Suspension from Office Pending Decision by the Ethics Commission on the Complaint Against Her.

Dear Mayor Murphy:

On November 19, the Board of Administration for the San Diego City Employees Retirement System (SDCERS) made several decisions that impact the future participation of Diann Shipione Shea, a trustee on the SDCERS Retirement Board. The purpose of this letter is to advise you of the Board's decisions and the basis of those decisions, and to request that you immediately suspend Ms. Shipione Shea from office pending a decision by the City's Ethics Commission on a complaint being filed against her by the Board.

Unfortunately, Ms. Shipione Shea had to leave last Friday's Board meeting unexpectedly, just before these issues were addressed. However, the conduct the Board was faced with was so severe and potentially damaging to SDCERS's interest in pending litigation that immediate action was necessary. Many on the Board were dismayed that she was not available to respond to these serious charges and we hope she will do so as part of the Ethics Commission investigation.

Turning to the action taken against Ms. Shipione Shea, by an 11-0 vote, the Board has barred Ms. Shipione Shea from participation in all future closed sessions. By a 10-1 vote the Board voted to file a formal complaint against her with the Ethics Commission. In addition, by a 9-2 vote the Board decided to provide you with this notice and to request Ms. Shipione Shea's immediate suspension from the SDCERS Retirement Board for the reasons set forth below.

The Board's decisions arise from Ms. Shipione Shea's disclosure of attorney-client privileged information and confidential closed session discussions to James Gleason, the plaintiff in a multimillion dollar lawsuit pending against SDCERS and the City. On November 3, 2004, Mr. Gleason submitted a sworn declaration in the matter of *Gleason v. City of San Diego et al*, SDSC case number GIC803779, stating that Ms. Shipione Shea told him terms of SDCERS' privileged fee arrangement in another litigation, *SDCERS v. Hanson Bridgett, et. al*. SDSC case number GIC831983.

Two days prior, on November 1, plaintiff's attorney, Mike Conger, demanded the very same information in a private telephone call to SDCERS' outside counsel, Michael Leone. Within a few minutes of Mr. Conger's call, Ms. Shipione Shea called Paul Barnett, SDCERS' Assistant Administrator, and asked him to refresh her memory as to the exact terms of SDCERS' contingent fee agreement. Mr. Barnett was aware of Mr. Conger's demands and did not provide the information.

It now appears Mr. Conger had already been provided the requested information by his client, Mr. Gleason, who apparently had obtained it from Ms. Shipione Shea. By his actions and with Ms. Shipione's assistance, it appears Mr. Conger hoped to obtain the information legally, so that he could use it in support of his \$10.7 million dollar attorney fee claim pending against SDCERS and the City in the *Gleason* litigation. Thus, it appears Ms. Shipione Shea willfully used confidential information to help the plaintiffs obtain money from SDCERS and the City.

Fortunately, Mr. Conger's *ex parte* application to compel SDCERS to provide its *Hanson Bridgett* fee agreement in the *Gleason* litigation failed. The trial court in the *Gleason* litigation concluded that the information Ms. Shipione Shea shared with Mr. Gleason was protected by the attorney-client privilege, and placed that information under seal to prevent further unauthorized disclosure of SDCERS' privileged communications with its counsel in the *Hanson Bridgett* litigation. It is because of the court's decision to seal Mr. Conger's *ex parte* papers, including Mr. Gleason's declaration of the terms of the fee agreement, that the Board has not included a copy of the declaration for your review.

The Board's actions against Ms. Shipione Shea were taken to protect SDCERS from further prejudice in litigation. No one may disclose confidential information that has been obtained in closed session authorized by Govt. Code §54956.9 to a person not entitled to receive it. (Govt. Code § 54963.) Moreover, the contingent fee agreement discussed in closed session is, in itself, protected by the attorney-client privilege. (Evid. Code § 952; B & P Code 6149.) The attorney-client privilege is just as available to public

The Honorable Richard M. Murphy
November 22, 2004
Page 3

agency clients and their lawyers as to their private counterparts. (*Holm v. Superior Court* (1954) 42 Cal.2d 500, 506-508.) .

As a fiduciary, Ms. Shipione Shea is obligated to conduct herself with the "utmost integrity, professionalism and ethical behavior". (Board Rule 1.10.) She is specifically charged to "avoid any activity which may be interpreted as a conflict of interest"; to maintain the confidentiality of SDCERS information; to refrain from knowingly being party to any illegal activity related to SDCERS and to refrain from engaging in outside activities of "financial or personal interest" that may conflict with the impartial and objective execution of SDCERS' business. (Board Rule 1.10(g),(j); Board Rule 1.20(c), (g).)

Ms. Shipione Shea's willful disclosure of confidential, attorney-client privileged information obtained in closed session is also a violation of the City's ethics laws, SDMC § 27.3564, which provides that "it is unlawful for any City official to use or disclose any confidential information . . . acquired in the course of his or her official duties . . .". The Board's complaint against Ms. Shipione Shea for violation of the City's Ethics laws will be filed in the very near future.

Based on Ms. Shipione Shea's conduct, the Board requests that you suspend her from the Board pending the Ethics Commission's decision. The Board's request is based on Charter sections 30 and 117; Govt. Code § 54956.9; SDMC § 27.3564(e); Evid. Code § 952; and Board Rules 1.10, 1.20; and for threatening the Board's position in a multi-million dollar litigation pending against SDCERS and the City.

Thank you for your attention to this serious matter. Please call me if you have any questions.

Sincerely,


Lorraine Chapin
General Counsel

cc: Lawrence B. Grissom, Retirement Administrator
Paul Barnett, Assistant Retirement Administrator
SDCERS Board Members

W:\ATTY\BOARD\Correspondence\mayor.noticeshipione_jec.doc

*sd CERS
San Diego City Employees'
Retirement System*

TO: Loraine Chapin, Attorney sdCERS
FROM: Diann Shipione, SDCERS Trustee
CC: SDCERS Board; Lawrence Grissom; Paul Barnett; Mayor Dick Murphy
DATE: November 24, 2004

RE: Your Letter of November 22, 2004 re Your Efforts to Remove me from Closed Sessions, And Your Request to Mayor Murphy To Throw Me off The Board

Thank you for your letter of November 22, 2004, regarding the Board's action in Closed Session on November 19th to bar me from participating in future closed sessions, and requesting the Mayor to suspend me as a Trustee pending resolution by the Ethics Commission of a complaint you may file.

This behavior is reckless and irresponsible for many reasons. I will try to go over a few.

While I appreciate your creative and deprecating description of Mr. Conger's efforts in the Gleason Wood case, I would remind you that his efforts were on behalf of the System to reverse, in part, the illegal underfunding orchestrated by the Board with your assistance. This resulted in the System receiving about \$ 70,000,000 more from the City than we would have had without his efforts and we have received strong suggestions from advisors to the fact Conger's suit should have been supported by the System and that the underfunding agreements should be rescinded (See, e.g., my letter to Larry Grissom of March 26, 2003). The fact that you apparently do not want to pay him for a service you should have been performing over the years, but did not, is not surprising. In any event, no one on this board can argue in good faith that we are anything but better off as a result of Mr. Conger's efforts on behalf of Retired Members of the System who were compelled to do the job we should have been doing for the System in the first place.

Fact Errors

There are three substantive matters you have just gotten wrong in your recitals.

First, I appreciate your ending comments that some of the Board members would like to have heard a response from me to the variety of issues you apparently raised on November 19. I would like to have been able to respond. However, since you did not formally notice this matter for open or closed session, or otherwise reflect it in the agenda, or your intended actions or recommendations for that matter, I was unaware of your reserved intent for me at that meeting. Other Trustees may have been better informed. Perhaps we will have the opportunity to find that

out. I have already advised you of the lack of Brown Act compliance in the past (see my memo to Mr. Grissom of February, for example). And, the Board has already been successfully sued for Brown Act violations you allowed.

Apart from formal notice, it would have been a matter of fairness to call me and put me on informal notice of this extraordinary event, were that important to you. You could have called me on the phone before the meeting to ask me about your concerns, suspicions, facts or conclusions. Just to make certain about such an important matter. At a minimum, when I announced during the meeting that I had to return to work and would not be attending closed session but wanted to go on record as voting in opposition to the DROP interest matter that was coming later in the meeting, it would have been courteous of you to mention to me at that time your hidden agenda for closed session. But, you did none of these things.

The Brown Act violation, apart from rude and irregular, has rendered the Board's action void and subject to another losing suit.

Second, while I appreciate your creative revisionist historical account, if you proceed as you suggest, you will find that the information on my attorney's fees inquiry in the Hanson Bridgett matter was handled through Paul Barnett and System staff in a manner consistent with previous inquiries from me on the matter of attorney's fees. You will note regular inquiries from me to Larry Grissom, Paul Barnett and other System staff regarding the fees we have paid to Vitek's firm, Coughlan's, Hennessey's and practically all others. The nature of my inquiry here, and the responses of the System's representatives in this case, are reflected in unprivileged e-mails (I wonder if you passed those out to Board members for their review before their vote?).

Beyond that, I wonder if you distributed Mr. Gleason's actual declaration to the Board? I had never seen it, and you neglected to attach one to your letter so I had to go get one for myself. And, here is what is funny about this nonsense you have led the Board to believe, and threatened to pursue in a formal proceeding that would make you look ridiculous: the declaration is inconsistent with the e-mails and communications to me from Staff who originally advised me they thought the Behan Smith attorney's fees agreement was "contingent", but advised on October 29th that it was not "contingent" but rather a "retainer" arrangement. See e-mail to me of that date. That unprivileged information (i.e. it was a "retainer", NOT a "contingency" fee arrangement) was passed on to Mr. Gleason on the 29th of October. Three days later, Mr. Gleason incorrectly signed his declaration to the effect that he thought the fee arrangement was "contingent". Another alternative is that you got "played" by your litigation adversary who didn't believe that your deal was retainer and "smoked you out" by putting in the contingency fee to which you over reacted.

But, here is the point. I was never given a copy of either agreement or ever saw either agreement (assuming there were two agreements) even though I requested one. Mr. Barnett said the "retainer agreement" itself was privileged. So, all I ever knew was that staff originally thought it was a 'contingent type' agreement, and later confirmed that it was a 'retainer type' arrangement three days before the Gleason declaration. All of those communications were unprivileged and the documentation in support is clear to that effect. That information, in the exact nature as received by me, was related to Mr. Gleason, a System beneficiary, including the fact that the System would not provide me with a copy of anything. You will note from his declaration that Mr. Gleason had no specific information about the either arrangement, rather he

thought it was a contingent fee at an unknown percentage. I do not know why he did not mention the 'retainer' type arrangement or that I did not ever have either agreement.

In response to your theatric use of bold lettering in the second paragraph of page 2 of your letter, clearly understand this: I was never given access to either agreement other than as outlined above. I have never had a copy of any such agreements or arrangements. None of what I was told by staff was confidential, and the Gleason declaration confirms that he knew only what I was told by staff in the most general terms (and it was incorrect at that). By the way, I am prepared to personally advise the Court in the Hanson Bridgett matter on all of this, and will fully respond to your empty threat of contempt directly to the court in this regard. In the meantime, please send me the Court's "ruling" that you reference on page 2 of your letter or the transcript of the Court's remarks.

Third, the matter of inquiring about fees is identified as one of the three principle areas of Trustee work on Boards such as ours. (See reference to Article XVI, Section 17 of the California Constitution¹ in the City's Vinson & Elkins report, pages 21 and 22). The fact that this information is regularly hidden, and rarely asked about by other trustees, does not make my inquiries any less appropriate. Perhaps one reason so little light is shed on this matter is that most other members of the board (and certain Staff such as yourself), except me, have individual lawyers defending underfunding and fiduciary duty lawsuits paid for by the System costing in the millions (my request for Mr. Akers to serve as my counsel was denied by the System). Again, both Larry Grissom and Paul Barnett, as well as other staff, will confirm that I regularly inquire about all attorneys fees. There is no other way to determine if those fees are "reasonable".

Unsupported and Irregular Citations

There are a couple of your citation matters that are equally flawed.

The Muni Code sections are out of context in your argument. Your reference to 27.3564 misleadingly fails to finish the provision, which reads, "...except when such disclosure is a necessary function of his or her official duties." Perhaps just an oversight on your part.²

¹ "The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purposes of providing benefits to participants in the pension or retirement system and their beneficiaries and defraying reasonable expenses of administering the system." (Emphasis added)

² Other portions of this section, which you do not cite, are also enlightening as to your exposure:

- (a) It is unlawful for any City Official to use his or her position or prospective position, or the power or authority of his or her office or position, in any manner intended to induce or coerce any person to provide, directly or indirectly, anything of value which shall accrue to the private advantage, benefit, or economic gain, of the City Official or his or her immediate family. As used in this section, the term "private advantage, benefit or economic gain" means any advantage, benefit, or economic gain, distinct from that enjoyed by members of the public without regard to official status or not resulting naturally from lawful and proper performance of duties. A City Official engages in a prohibited use of his or her official position or prospective position when he or she engages in activities other than in the lawful and proper performance of his or her City duties.
- (c) It is unlawful for any person to induce or coerce, or attempt to induce or coerce any other person to engage in any activity prohibited by subsections (a) and (b).

This language appears to be even broader than 1090, which is already a problem the affected members of the Board have dealt with by unilaterally "abrogating" its effect on themselves.

But, as long as you have the Muni Code out, review 27.3573, the section just after the above section that you cite out of context. This admonishes you and the Board's members regarding your intended ethics proceeding and provides, in pertinent part:

"It is unlawful for any City Official to use or threaten to use any official authority or influence to effect any action as a reprisal against a city official who reports or otherwise brings to the attention of ...[the]... appropriate agency, office or department any information regarding the subjects described in subsection (a) [which includes (2) a gross waste of City funds; or, (3) a gross abuse of authority; or, (4) a conflict of interest; or (5) ...use of a City office or position, or use of City resources for personal gain"]"

(Keep this in mind regarding the "Obstruction of Justice" section, below.)

With respect to the two Board Rules you cite, your omissions are also material:

Board Rule 1.10 Fiduciary Responsibilities

It is the obligation of every Board Member of SDCERS to conduct himself or herself with utmost integrity, professionalism and ethical behavior in relations with retirees, members, the public, the City or its contracting agencies and the SDCERS staff.

Each Board Member shall:

- (a) recognize and be accountable for his or her responsibility as a fiduciary;
- (b) attend meetings and be fully informed and prepared to discuss issues docketed on the agenda of the Board or any Committee to which he or she is assigned;
- (c) be responsible for maintaining his or her own professional competence on retirement issues by reading periodicals and attending conferences or seminars, as necessary and appropriate;
- (d) be responsible for acquiring a basic knowledge of the open meeting laws (Brown Act) and Robert's Rules of Order;
- (e) conduct all SDCERS business responsibilities in a fair manner and be honest in all business negotiations;
- (f) strive to provide the highest quality of performance and counsel;
- (g) avoid any activity which may be interpreted as a conflict of interest;
- (h) exercise prudence and integrity in the management of funds under supervision of the Board;
- (i) communicate to an appropriate Board or staff member information on actions that may be violations of the law, these rules, or actions which may be conflicts of interest; and,
- (j) maintain confidentiality of information so designated which is received or maintained by SDCERS.

You cite Board Rule 1.10 stating that, "you are obligated to conduct yourself with the 'utmost integrity professionalism and ethical behavior'" however you again omit the rest of the sentence which states "in relations with retirees, members, the public, the City or its contracting agencies and the SDCERS staff." This makes your citation completely out of context. Perhaps you do not believe that Mr. Gleason and other retirees should be treated in compliance with this Board Rule. Furthermore, you cite this Board rule yet violate it by exactly what you and the Board did, i.e. not docket this item "on the agenda" according to "open meeting laws (Brown Act)" and conducting this business in a "fair manner". And you have always been mute to this Board rule with respect to the "conflict of interest" and other corresponding "actions that may be violations of the law" resulting from the Board approving the underfunding agreement.

Board Rule 1.20 Prohibited Actions

No Board Member shall:

- (a) utilize any property or resources of SDCERS for personal gain;
- (b) falsify or fail to record proper entries on any books or records of SDCERS;
- (c) knowingly be a party to, or condone, any illegal activity as it may concern Board activities;
- (d) authorize payment on behalf of SDCERS of any amount, or for any purpose without approval from the Board;
- (e) authorize or direct SDCERS staff to expend funds or expend time performing any function or activity outside the scope of duties routinely performed by the staff member without first obtaining approval from the Board;
- (f) directly or indirectly seek or accept gifts, money or property that would influence or appear to influence the conduct of his or her duties;
- (g) engage in or conduct outside activities of financial or personal interest that may conflict with the impartial and objective execution of SDCERS business activities;
- (h) sell or provide goods and services to SDCERS, directly or indirectly, without disclosure;
- (i) knowingly engage in any serial, rotating, or seriatim meeting through which a quorum of the Board becomes involved in the acquisition of information or deliberation of any issue, unless the notice and public access provisions of the open meeting laws are satisfied;
- (j) engage in outside employment that would interfere with or hamper expected performance at SDCERS; or,
- (k) fail to attend three (3) consecutive meetings of the Board or four (4) meetings in a calendar year, except that failure to attend a meeting will automatically excused if the Board Member is unable to attend the meeting because he or she is performing Board related duties. The Board may also vote to excuse the absence of any member from a Board meeting when the Board member's absence is justified by a factual finding of good cause.

In this case of Board Rule 1.20 (c), the Board's animosity, and your behavior, results not from my illegal behavior but from my intolerance of the Board's illegal behavior. If this matter goes to the Ethics Commission that illegal behavior will be described in excruciating detail including the warnings known to the Board members that voted in a manner inconsistent with the law as we know it.

Most entertaining of all, you cite Board Rule 1.20 (g) that precludes, among other things:

(g)outside activities of financial or personal interest that may conflict with [Board duties...]

We have previously debated your universal use of Board Rules 1.10 and 1.20. I remember the last time you accused me of having breached these rules as a result of your false allegations that I had "private conversations" with an attorney Cunningham in connection with a disability matter before the board. Not only did the Rule not apply, the alleged conversations never took place. I also recall you being forced to acknowledge that you were substantively wrong about these allegations. (Just to refresh your recollection, see page 1 and 2 of the February Board Meeting Summary containing the Board questions to Mr. Cunningham and his responses³. I believe you

³ Questions of Attorney Cunningham by Trustee Shipione in open session, 2/21/03:

Q: Is Mr. Cunningham in the Audience?

A: "Yes."

Q: Have I ever spoken with you on the phone about anything?

A: "No you have not."

Q: Have we ever spoken privately about anything?

A: "We have not."

Q: Have we ever met privately or know each other socially?

A: "We have not, and we do not know each other socially."

formally apologized to me for your error, which I appreciate). You again suggest here, as you did with the Cunningham matter, that my having an intense interest in the work the Board should be doing, makes those interests and efforts "personal" for purposes of the Rule. It does not. The "personal interest" to which the Rule refers means "getting something for you personally". Like when you plan to, or actually vote for, illegal underfunding in return for special benefits to you. It does not apply to trying intently to do the right thing. And, as you know, I get no compensation or other financial benefit of any kind from my service.

I note your effort to ignore the rules with respect to removal as well. You cite Charter Sec.30 and Board Rule 1.30 as authority for what you want to do, but do not quote it because you obviously did not come close to complying. Board Rule 1.30 provides as follows:

Rule 1.30 Censure or Removal Board Members

During the course of any public meeting of the Board, if an issue is raised by any member, retiree or public related to a Board member's lack of compliance with Board Rule 1.20, the Board may direct staff to investigate and report back on the matter and may subsequently place the matter on the agenda for consideration and disposition, in which case the following process shall be observed:

- (a) upon consideration of the factual circumstances and after making a finding of good cause, the Board may vote to censure any Board Member who fails to comply with the provisions of Board Rule 1.20; or
- (b) upon consideration of the factual circumstances and after making a finding of good cause related to a breach of fiduciary duty, the Board may recommend to the appropriate appoint authority that action be taken to remove an appointed member of the Board. If the offensive act by the Board Member rises to the level of being willful or corrupt, the Board may refer the matter to the County Grand Jury to initial judicial action by the District Attorney pursuant to Government Code section 3060 et seq.

You did not do this in the course of a public meeting – in fact, you did not even notice the item. So, there was no "issue raised by any member, retiree or public related to a Board member's lack of compliance with Board Rule 1.20" particularly "during the course of any public meeting." And, the Board did not "direct staff to investigate and report back on the matter". Nor was the matter placed "on the agenda" for public consideration and disposition. Finally, you did not refer the matter to the proper appointing authority as defined in both Charter Sect 30 and Board Rule 1.30 (b), as the City Council. Instead you just went to the Mayor, who does not have this power under the Charter. For your information, if the Board actually goes back and complies with the Brown Act and the removal provisions of 1.30 and Charter 30, I am prepared to have this matter submitted to the Council for action in public session. But, you did not follow any of the provisions respecting Rule 1.30. You just make this stuff up as you go along.

Finally, you reference Govt. Code Sec. 54963 as support for your efforts with Mayor Murphy to unseat me. Keep in mind the specific limitations of 54963 sub-section (e) as follows:

(e) A local agency may not take any action authorized by subdivision (c) against a person, nor shall it be deemed a violation of this section, for doing any of the following:

- (1) Making a confidential inquiry or complaint to a district attorney or grand jury concerning a perceived violation of law.**

Q: Have we ever exchanged correspondence?

A: "We have not."

including disclosing facts to a district attorney or grand jury that are necessary to establish the illegality of an action taken by a legislative body of a local agency or the potential illegality of an action that has been the subject of deliberation at a closed session if that action were to be taken by a legislative body of a local agency.

(2) Expressing an opinion concerning the propriety or legality of actions taken by a legislative body of a local agency in closed session, including disclosure of the nature and extent of the illegal or potentially illegal action.

(3) Disclosing information acquired by being present in a closed session under this chapter that is not confidential information.

(f) Nothing in this section shall be construed to prohibit disclosures under the whistleblower statutes contained in Section 1102.5 of the Labor Code or Article 4.5 (commencing with Section 53296) of Chapter 2 of this code.

Obstruction of Justice/ Retaliation

What is really going on here, Ms. Chapin, with this latest of your efforts to kick me off the Board, is another thinly veiled try to stop my participation for what are other obvious reasons.

The real interest in the fee agreement with Behan and Smith to begin with came from the public disclosure in the V&E report from Ms. Lexin that the Board had been 'bluffed' (defrauded) by the City and System staff in the 2002 underfunding agreement vote. This raised serious matters relating to nature of the claims and legal services to be provided by Behan and Smith, the purpose of the litigation against our former fiduciary counsel, Mr. Blum, and whether the action would be civilly and/or criminally fraudulent against the insurance companies (subjecting the System and individual trustees to extreme legal exposure). I voiced concerns to Mr. Barnett regarding this matter and it is reflected in his unprivileged e-mails and in our conversations. Your office has been non-responsive in addressing this and seems more concerned about finding a way to not address it. The relevant documentation is public and compelling. Ms. Lexin is suddenly (and conveniently) no longer on the Board. (see also my memo to the Board of November 19, 2004 re Failure To Disclose Fee Agreements: Misuse of System Funds)

More generally, you are personally aware that other efforts have occurred at other meetings to discontinue my inquiries into System irregularities and efforts to promote transparency and cooperation with investigating authorities. You are aware of efforts by certain Board members and staff to discontinue my support of these investigation efforts and the full accountings to the plan sponsor, the beneficiaries and the public respecting past Board and City activities. You are aware of the intimidations and voiced hostilities to board members who may be inclined to assist in the investigations rather than stonewall the authorities. See my March 22 memo re obstruction of justice. These actions not only are intended to obstruct pending investigations and the justice process on the federal level, but clearly violate 25.3573, cited above.

Your contrived efforts here, based on silly and created claims, are not supported by either the documents or events. A filing of allegations in a formal proceeding waives all suggestions of

privilege or confidentiality, and you can be assured that my response will be comprehensive and complete in every and all areas, including but not limited to, the irregularities the System has engaged in despite compelling opposing thought based in common sense, concepts of fiduciary trust, and access to reference materials strongly to the contrary. The non-noticed action of the board you orchestrated last Friday, if it leads to the actions you suggest, will be met with the fullest response and you can expect a full and public accounting of the real intent of your office, the Board, and individual Board members in this regard. I will pursue every response and course against every entity and person, whether in the System or in the City, involved in this irregular business. And, you know I mean it.

You are headed down a very dangerous track where your foolish games will not serve you, and will gravely disappoint your Board. I am confident you will be called to account by every member of the System.⁴

I recommend instead that the Board reconsider and rescind this action in light of the obvious Brown Act violation, the fact manipulations, and the fact that you basically made up the legal citations or used them out of context.

Since you sent your letter to the Board and Mayor, all will receive this as well.

Regards.

⁴ I have previously filed two Formal Complaints Against Ms. Chapin with the Board one on 2/15/04 and the other on 9/30/04 for inadequate, irregular and questionable legal work with respect to her advice in the multi billion dollar bargained away underfunding of the System, Brown Act Violations and violations of the City Charter and State Law. Additionally, I have advised the Board, Staff and Ms. Chapin of my intent to file a complaint against Ms. Chapin with the State Bar on similar grounds. I bring this up only because this highly irregular and legally unsupported process reflected in her letter of November 22 appears retaliatory in violation of Muni Code 25.3745 and various other State laws and Board Rules, some of which are referenced above.



December 1, 2004

Diann Shipione
7701 Exchange Place
La Jolla, CA 92037

Dear Ms. Shipione,

This letter is in response to your November 24, 2004 e-mail to Lori Chapin regarding the SDCERS Retirement Board's decisions at its November 19, 2004 closed session meeting. I want to clarify these decisions for you so there is no misunderstanding or miscommunication:

1. At the Board's request, Ms. Chapin prepared the November 22, 2004 letter to you so that you would be formally informed of the Board's decisions as quickly as possible. This was not something that Ms. Chapin unilaterally decided to do on her own, nor was she responsible for the action taken by the Board. As our General Counsel, I asked Ms. Chapin to prepare a report to the Board on what action could be taken by the Board once I was informed of your violation of the Board's confidential, privileged information as communicated to the Board in closed session and Mr. Gleason's declaration affirming that disclosure. It would be wrong for you to interpret the Board's 11-0 vote to bar you from further closed session as something that Ms. Chapin orchestrated.
2. The matter of your disclosure of privileged information stemming from the Hanson Bridgett pending litigation was properly disclosed on the November 19, 2004 Retirement Board agenda as a closed session item regarding this pending litigation. No violation of the Brown Act occurred. The issue you disclosed to Mr. Gleason was originally discussed in closed session when the Board discussed the Hanson Bridgett litigation at its October 15, 2004 meeting. Therefore, it was appropriate to notify the Board of your violation of this closed session information in closed session at the November meeting.
3. The offer for you to address the Board in closed session regarding the decisions it took on November 19th stands. Please let me or Mr. Grissom know by no later than Wednesday, December 8, 2004 if you would like me to include a closed session item on the December agenda. I would remind you that discussing the specifics of the Board's actions in open session as it relates to matters that have been previously discussed in closed session will not be permitted. This would include any discussion regarding the fee arrangements SDCERS has with its attorneys handling the Hanson, Bridgett matter.

Sincerely,

Frederick W. Pierce, IV
President

cc: SDCERS' Board; Mayor Murphy

sd CERS
San Diego City Employees'
Retirement System

Via Electronic Mail and U.S. Mail

December 8, 2004

Mr. Fredrick Pierce
President, *sdCERS*
401 "B" Street, Ste 400
San Diego, CA 92101

Re: Your Letter of December 1, 2004 re Board Action in Closed Session 11/19/04 To
Exclude Me From Closed Sessions And Request Mayor Murphy Throw Me Off Board

Dear Mr. Pierce,

Thank you for your letter of December 1, 2004, which I received December 4th, regarding the Boards action in closed session on November 19 and the correspondence of Loraine Chapin of November 22.

1. The fact that you apparently were involved in planning this event does not save it from being irregular and not lawful. As I point out in my written response to Ms. Chapin (also circulated to the Board) on November 24, the methodology Ms. Chapin, and apparently you, took to accomplish this highly unusual business is not consistent with even our own Board Rules (1.30, among others) which **require open, public hearings** on the subject of even whether to initiate the investigation of a member of the Board which the two of you decided to do in complete secret.
2. You and Ms. Chapin did violate the Brown Act on November 19th, and you both know it. First, your suggestion that a vague reference to pending litigation in the distributed agenda is sufficient to conduct an evidentiary hearing on my performance as a Trustee is just silly. The Closed Session agendas for the last three months have been identical in just listing and naming the "pending litigations", and you can't even identify from this agenda *which* of the various litigation matters is supposed to be the "noticed" one for this trumped up hearing directed at me. Second, Mr. Pierce, I can only assume you and counsel Chapin did not advise the Board that Sect. 54957 of the Ralph K. Brown Act (Gov. Code Sects. 54950-54962) **specifically precludes closed session discussions on the performance of public officials or members of the Board.** In other words, what you and Ms. Chapin did in Closed Session, even if you had given adequate notice - which you did not - is **specifically prohibited** under the Brown Act. That is why our Board Rule 1.30 **requires** this nonsense to be in open session. If it were possible to do what you and Ms. Chapin did, Boards and Councils would regularly toss out vocal non-insiders. (For Board

members unfamiliar with this provision, I include it below along with the executive summary by the "First Amendment Project" on the required open session protection to office holders and Board members. The First Amendment Project, which you can all access on line, is very helpful in getting straight answers on these subjects.) Finally, as a matter of fairness, if you check you will find out that I actually called Ms. Chapin's office the week of the November 19th meeting to inquire about what specifically was going to be discussed in Closed Session on November 19th. Her secretary, Dawn, said Ms. Chapin would return my call with that information which, of course, she did not.

3. Contrary to your letter, there was never an "offer" made to me to address the Board on November 19th and it should now be clear to the Board that efforts were made to accomplish just the opposite. So, I have no idea what you mean by the "offer". But, let me repeat again, the Brown Act specifically prohibits the discussions and actions you propose to accomplish in secret, and the actions you took last meeting are void. So, even if I *wanted* to make my defense to this nonsense in closed session – which I do not – I could not, and would not, because it is not legal to do so. I will be happy to respond to all trumped up charges, rumors and allegations in open session, as provided by law. Further, I intend to attend all future Closed Sessions as your previous actions are clearly void, and your suggested procedure to refresh this mischief is equally not legal. The Brown Act provides remedies against all individuals participating in these violations. Additionally, an Ethics Commission "Complaint" requires "verification" under penalty of perjury, and there are special penalties for anyone signing, or participating, in that filing.
4. In order to avoid further embarrassment, I have submitted this matter to the Public Integrity Department of the City Attorney's Office for an opinion, and appropriate action, on the Brown Act violation matter. I hope the opinion alone will be available shortly. I enclose a copy of my letter to the City Attorney's office together with the related materials.

By the way, the ruse of using the suggested 'secret' "sworn declaration" of Mr. Gleason as the grounds for throwing me off the Board now seems even more absurd. I have now re-read Ms. Chapin's letter and the Gleason pleading. Not only was the e-mailed, and openly discussed matter of the Hansen Bridgett "retainer" (contingent?) fee agreement not 'secret' or 'privileged' at any time, much less at the time of its use for all the reasons set forth in my memo to Ms. Chapin of November 22, (and certainly is no longer 'secret' now that Ms. Chapin and you have widely distributed the matter in writings to the Mayor who is not a member of the Board), but it was not even a "sworn statement" at all (there is no declaration under penalty of perjury). In other words, our attorneys may have been played.

Finally, I continue to raise the earlier issues which someone finds so unnerving that it results in this farcical gambit on the Gleason's unsworn pleading. The Blum lawsuit is potentially fraudulent to the insurance company due to the Lexin statement in the V & E report that the System was being 'bluffed' (defrauded) by the City on the 'contingent' element of more benefits in return for the billion dollar underfunding. Bad enough to do the first time. This makes it even worse. We shouldn't take the insurance company's money without fully disclosing this matter.

Beyond that there is the matter of a possible multi-million million 'fee' to the attorneys that may have worked for only a few weeks, took no discovery and were only authorized to "talk" to Blum's attorneys. Something is very wrong about all this.

Sincerely,

Diann Shipione, Trustee

cc: sdCERS Board
Lawrence Grissom
Paul Barnett
Mayor Murphy
Rupert Linley, Esq.

[Brown Act Sect 54957]

54957. Nothing contained in this chapter shall be construed to prevent the legislative body of a local agency from holding closed sessions with the Attorney General, district attorney, sheriff, or chief of police, or their respective deputies, on matters posing a threat to the security of public buildings or a threat to the public's right of access to public services or public facilities, or from holding closed sessions during a regular or special meeting to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee by another person or employee unless the employee requests a public session.

As a condition to holding a closed session on specific complaints or charges brought against an employee by another person or employee, the employee shall be given written notice of his or her right to have the complaints or charges heard in an open session rather than a closed session, which notice shall be delivered to the employee personally or by mail at least 24 hours before the time for holding the session. If notice is not given, any disciplinary or other action taken by the legislative body against the employee based on the specific complaints or charges in the closed session shall be null and void.

The legislative body also may exclude from the public or closed meeting, during the examination of a witness, any or all other witnesses in the matter being investigated by the legislative body.

For the purposes of this section, the term "employee" shall include an officer or an independent contractor who functions as an officer or an employee but shall not include any elected official, member of a legislative body or other independent contractors. Nothing in this section shall limit local officials' ability to hold closed session meetings pursuant to Sections 1461, 32106, and 32155 of the Health and Safety Code or Sections 37606 and 37624.3 of the Government Code. Closed sessions held pursuant to this section shall not include discussion or action on proposed compensation except for a reduction of compensation that results from the imposition of discipline.

[First Amendment Project Explanation of Sect. 54957 as it applies to Trustees]

EVEN AT CLOSED MEETINGS...

Special ~~public notice~~ and agenda requirements apply (§§ 54954, 54954.2, 54954.5, 54957.7).

All actions taken and all votes in closed session must be publicly reported orally or in writing within 24 hours (§ 54957.1(b)), and copies of any contracts or settlements approved must be made available promptly (§ 54957.1(b),(c)).

What if...

CLOSED MEETINGS MAY BE HELD FOR:

Personnel -- Only to discuss the appointment, employment, performance evaluation, discipline, complaints about or dismissal of a specific employee or potential employee (§ 54957). The employee may request a ~~public meeting~~ on any charges or complaints.

But closed sessions are NOT ALLOWED for discussing:

- general employment
- independent contractors not functioning as employees
- salaries
- the performance of any elected official, or member of the board
- the local agency's available funds
- funding priorities or budget

sd CERS
San Diego City Employees'
Retirement System

December 8, 2004

Rupert Linley, Esq
Chief Deputy, Criminal Division
Chief, Public Integrity Division
Office of the City Attorney
1200 Third Avenue, Ste 1600
San Diego, CA 92101-4187

Re: Intentional Brown Act Violations re Closed Sessions; Illegal Agreements

Dear Mr. Linley:

The undersigned is a member of the Board of Administration of the San Diego City Retirement System.

On November 19th, the Board in a closed session not noticed for the purpose, took actions to preclude me from all future closed sessions of the Board and requested intervention of the Mayor (without any legal authority) to "suspend" me from all future Board meetings pending a decision from the Ethics Commission on a complaint they planned to file in the future. I was not told of the intent of the board to entertain any of these matters at the November 19th meeting, and though I attended the open session, I was not at the closed session portion of the meeting. I was subsequently advised of their action on November 22nd.

The written notice from board attorney Loraine Chapin and my written response dated November 24 are herewith. I later received follow up correspondence from Board President Fred Pierce, and responded to it today. Those written materials are also enclosed.

Without arguing here the nonsensical foundation of the Board's actions (it is in the materials enclosed), the Board clearly took all of these actions in an un-noticed closed session in violation of 54957 of the Brown Act which specifically prohibits closed sessions discussions and action on the performance of a trustee. (It also violates our own Board Rule 1.30). The remedy suggested by Mr. Pierce to correct the initial illegal conduct of the Board on the 19th was to have yet another secret session in violation of the Brown Act. I have refused to participate in this additional illegal behavior.

I believe the real reason for this contrived, and apparently very well planned, intentional illegal conduct by the Board is the need to cover up other illegal or irregular matters, which the Board seeks to keep from me and the public for obvious reasons.

I have advised Mr. Pierce that I will not respect the Brown Act violations he apparently facilitated, and I will not participate in the Brown Act violation he suggests to correct them. I intend to attend closed sessions in the future notwithstanding the illegal November 19th acts.

I will, however, change that position if, upon consideration of only the Brown Act issues, your office concludes that Board members and office holders can be removed from Boards and councils in secret session notwithstanding the Brown Act provisions to the contrary. I would appreciate your response to this matter alone before December 17, 2004, the date of our next Board meeting, in order to maintain order and decorum and preclude the possibility of further actions by any of the parties that could lead to far more serious consequences.

After the decision on the Brown Act matter, I would be happy to meet with your Public Integrity investigators on the substance of this very irregular business. This behavior makes no sense except in the context of more troubling issues.

Sincerely,

Diann Shipione, Trustee

encl.

cc: *sdCERS* Board
Lawrence Grissom
Paul Barnett
Mayor Murphy

2. NEW BUSINESS

A. NO ACTION REQUESTED

1. PRESENTATION BY MERCER HUMAN RESOURCES CONSULTING OF THE BEST PRACTICES AUDIT.

B. ACTION REQUESTED

1. CLOSE OUT AUDIT OF MEMBER MIKE UBERUAGA.
2. RECOMMENDATIONS FOR A VENDOR'S CONFLICTS OF INTEREST POLICY.

XIII. QUESTIONS & COMMENTS FROM PRESIDENT, TRUSTEES, ADMINISTRATOR, ASSISTANT ADMINISTRATOR, ATTORNEY

XIV. NON DOCKET ITEMS

XV. CLOSED SESSION - TIME CERTAIN AT 3:00 P.M.

**1. CONFERENCE WITH LEGAL COUNSEL - EXISTING LITIGATION
(SUBDIVISION (a) OF SECTION 54956.9, CALIFORNIA
GOVERNMENT CODE)**

- A. ALAMEDA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION, ET. AL., V. BERNARD J. EBBERS, ET. AL., LOS ANGELES SUPERIOR COURT CASE NUMBER BC384748.
- B. MICHAEL ABRAMSKY, ET. AL. V. ALSTOM SA, ET. AL., 03-CV-6595(VM) UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.
- C. JAMES F. GLEASON AND DAVID W. WOOD, ET AL., V. CITY OF SAN DIEGO, ET AL., SUPERIOR COURT CASE #GIC 803779 (CONSOLIDATED WITH CASE #GIC 810837 AND CASE #GIC 811756).
- D. SDCERS V. HANSON, BRIDGETT, MARCUS, VLAHOS & RUDY, ET AL., SAN DIEGO SUPERIOR COURT CASE NUMBER GIC 831983.
- E. SDCERS V. JUNE K. ACON, ET. AL., SAN DIEGO SUPERIOR COURT CASE NUMBER GIC 831900.

**SDCERS' RETIREMENT BOARD MEETING
FRIDAY, OCTOBER 15, 2004
AGENDA
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**X. QUESTIONS & COMMENTS FROM PRESIDENT, TRUSTEES,
ADMINISTRATOR, ASSISTANT ADMINISTRATOR, ATTORNEY**

XI. NON DOCKET ITEMS

XII. CLOSED SESSION - TIME CERTAIN AT 3:00 P.M.

**1. CONFERENCE WITH LEGAL COUNSEL - EXISTING LITIGATION
(SUBDIVISION (a) OF SECTION 54956.9, CALIFORNIA
GOVERNMENT CODE)**

- A. ALAMEDA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION,
ET. AL., V. BERNARD J. EBBERS, ET. AL., LOS ANGELES
SUPERIOR COURT CASE NUMBER BC384748
- B. MICHAEL ABRAMSKY, ET. AL. V. ALSTOM SA, ET. AL., 03-CV-
6595(VM) UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK
- C. JAMES F. GLEASON AND DAVID W. WOOD, ET AL., V. CITY OF
SAN DIEGO, ET AL., SUPERIOR COURT CASE #GIC 803779
(CONSOLIDATED WITH CASE #GIC 810837 AND CASE #GIC
811756)
- D. SDCERS V. HANSON, BRIDGETT, MARCUS, VLAHOS & RUDY, ET
AL., SAN DIEGO SUPERIOR COURT CASE NUMBER GIC 831983
- E. SDCERS V. JUNE K. ACON, ET. AL., SAN DIEGO SUPERIOR
COURT CASE NUMBER GIC 831900
- E. PUBLIC EMPLOYEE PERFORMANCE EVALUATION
(GOVERNMENT CODE SECTION 54957)

- TITLE: GENERAL COUNSEL

**XIII. NEXT MEETING: FRIDAY, NOVEMBER 19, 2004 - 1:30 PM
401 "B" STREET, SUITE 400
SAN DIEGO, CA 92101**

XIV. ADJOURNMENT

VIII. RULES COMMITTEE — JOHN TORRES, CHAIR

1. STATUS REPORTS

NONE

2. NEW BUSINESS

A. ACTION REQUESTED

1. AMENDMENT OF BOARD RULE 1.00 REGARDING THE BOARD'S PURPOSE AND INTENT
2. AMENDMENT OF DIVISION 10 OF THE BOARD RULES REGARDING PURCHASE OF SERVICE CREDIT
3. AMENDMENT OF BOARD RULE 7.11 ON TRAVEL REQUESTS

IX. INVESTMENT COMMITTEE — MARY VATTIMO, CHAIR

1. STATUS REPORTS

A. NO ACTION REQUESTED

1. VENDOR'S WATCH LIST
2. SDCERS' ASSET ALLOCATION STATUS
3. CALLAN REPORT ON SEC INVESTIGATIONS REGARDING CONSULTANTS, MARKET TIMING AND AFTER HOURS TRADING

2. NEW BUSINESS

A. ACTION REQUESTED

1. SELECTION OF CANDIDATES TO INTERVIEW FOR REAL ESTATE CONSULTANT

X. AUDIT COMMITTEE REPORT — DICK VORTMANN, CHAIR

1. STATUS REPORTS

A. NO ACTION REQUESTED

1. MERCER AUDITS AND THE FINANCIAL AUDIT

RULES COMMITTEE – JOHN TORRES, CHAIR

1. STATUS REPORTS

NONE

2. NEW BUSINESS

A. ACTION REQUESTED

1. REPORT ON PROPOSED BOARD RULE CHANGES

INVESTMENT COMMITTEE – MARY VATTIMO, CHAIR

1. STATUS REPORTS

A. NO ACTION REQUESTED

1. VENDOR'S WATCH LIST
2. SDCERS' YEAR TO DATE REALIZED RATE OF RETURN AND REALIZED GAINS PROJECTION CHART
3. SDCERS' ASSET ALLOCATION STATUS
4. REAL ESTATE CONSULTANT RFP PROCESS
5. CALLAN REPORT ON SEC INVESTIGATIONS REGARDING CONSULTANTS, MARKET TIMING AND AFTER HOURS TRADING
6. SECURITIES LENDING STATUS
7. CALLAN'S QUARTERLY PERFORMANCE REPORT AS OF 6/30/04

AUDIT COMMITTEE REPORT – DICK VORTMANN CHAIR

1. STATUS REPORTS

A. NO ACTION REQUESTED

1. MERCER AUDIT REPORTS
 - a) STATUS OF BEST PRACTICES AND GOVERNANCE AUDITS
 - b) RESPONSES FROM HARVEY RUBINSTEIN TO INVESTMENT OPERATIONS AUDIT PRESENTATION

**SDCERS' RETIREMENT BOARD MEETING
THURSDAY, AUGUST 19, 2004
AGENDA
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DISTRICT OF NEW YORK

- C. JAMES F. GLEASON AND DAVID W. WOOD, ET AL., V. CITY OF
SAN DIEGO, ET AL., SUPERIOR COURT CASE #GIC 803779
(CONSOLIDATED WITH CASE #GIC 810837 AND CASE #GIC
811756)**
- D. SDCERS V. HANSON, BRIDGETT, MARCUS, VLAHOS & RUDY, ET
AL., SAN DIEGO SUPERIOR COURT CASE NUMBER GIC 831983**
- E. SDCERS V. JUNE K. ACON, ET. AL., SAN DIEGO SUPERIOR
COURT CASE NUMBER GIC 831900**

**IX. NEXT MEETING: FRIDAY, SEPTEMBER 17, 2004 – 1:30 PM
401 "B" STREET, SUITE 400
SAN DIEGO, CA 92101**

X. ADJOURNMENT

3. TRAINING

A. ACTION REQUESTED

1. NATION'S POLICE & FIRE PENSION FUND LEADERS - GUNS & HOSES 2004, HILTON SAN DIEGO RESORT, 10/3-6, 2004
2. BRANDES INVESTMENTS PARTNERS - "INTELLIGENT INVESTING WORLDWIDE", FOUR SEASONS AVIARA, CARLSBAD, CA, 10/17-19, 2004
3. PUBLIC FUND BOARDS FORUM, SAN FRANCISCO, CA, 12/4-8, 2004

VI. QUESTIONS & COMMENTS FROM PRESIDENT, TRUSTEES, ADMINISTRATOR, ASSISTANT ADMINISTRATOR, ATTORNEY

VII. NON DOCKET ITEMS

VIII. CLOSED SESSION

**1. CONFERENCE WITH LEGAL COUNSEL - EXISTING LITIGATION
(SUBDIVISION (a) OF SECTION 54956.9, CALIFORNIA
GOVERNMENT CODE)**

- A. ALAMEDA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION, ET. AL., V. BERNARD J. EBBERS, ET. AL., LOS ANGELES SUPERIOR COURT CASE NUMBER BC384748
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- E. SDCERS V. JUNE K. ACON, ET. AL., SAN DIEGO SUPERIOR COURT CASE NUMBER GIC 831900

**IX. NEXT MEETING: FRIDAY, AUGUST 20, 2004 - 1:30 PM
401 "B" STREET, SUITE 400
SAN DIEGO, CA 92101**

X. ADJOURNMENT